FILED BY CLERK
APR 29 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MICHELLE P., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and MIA P., Appellees.	2 CA-JV 2009-0134 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J-18615500

Honorable Gus Aragón, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Dawn R. Williams
Tucson
Attorneys for Appellees

Ronald Zack
Tucson
Attorney for Appellant

E S P I N O S A, Presiding Judge.

¶1 On November 24, 2009, the juvenile court terminated the parental rights of appellant Michelle P. to her daughter Mia P. on grounds of Michelle's mental illness and her inability to remedy the circumstances causing Mia to remain in a court-ordered, out-of-home placement for more than fifteen months. *See* A.R.S. § 8-533(B)(3) and (B)(8)(c).[1] On appeal, Michelle contends that the evidence did not justify the termination of her rights on either statutory ground, that the Arizona Department of Economic Security (ADES) did not provide appropriate reunification services or make a diligent effort to reunify the family, that the juvenile court erred in finding severance to be in Mia's best interests, and that Michelle received ineffective assistance of counsel. We affirm.

¶2 Before it may terminate parental rights, a juvenile court must find by clear and convincing evidence that at least one statutory ground for severance exists, and it must find by a preponderance of the evidence that terminating the parent's rights is in the best interests of the child. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we must say as a matter of law that no reasonable person could find

[1]To justify severance pursuant to § 8-533(B)(3) under the facts of this case, the state was required to prove that Michelle "is unable to discharge parental responsibilities because of mental illness . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period."

Termination of Michelle's parental rights pursuant to § 8-533(B)(8)(c) required proof that Mia had been cared for in an out-of-home placement pursuant to court order for a cumulative total period of fifteen months or longer, that Michelle had been unable to remedy the circumstances causing Mia's out-of-home placement, and that "there is a substantial likelihood that [Michelle] will not be capable of exercising proper and effective parental care and control in the near future." *Id.*

those essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 9, 210 P.3d 1263, 1265-66 (App. 2009). If we find the evidence sufficient to sustain any single ground for severance, we need not consider an appellant's arguments pertaining to other statutory grounds on which the court also found termination justified. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶¶ 12, 27, 995 P.2d 682, 685, 687 (2000).

Factual and Procedural Background

¶3 We view the evidence in the light most favorable to upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). Michelle, who was thirty-three years old when Mia was born in December 2007, reportedly has suffered from mental illness since adolescence. She testified that she could recall "being melancholy" since she was twelve years old and had been diagnosed with a major depression when she was still in college in the 1990s. She has been enrolled as a client at La Frontera mental health clinic since at least 2002. And, in 2004, after experiencing "more and more problems with [both] depression and mania," she was diagnosed with bipolar disorder with schizophrenic tendencies. She also suffers from an anxiety disorder and possible obsessive-compulsive disorder.

¶4 Although Michelle's illness appears to be reasonably controllable with medication, she has a significant history of periodically discontinuing her medication. According to her own testimony and that of her mother and siblings, she has stopped taking her prescribed medication at least six or seven times since 2002, creating what her sister-in-law described as a "constant roller coaster over the past seven years" for her

family. When she is off her medication, Michelle's behavior becomes erratic and extreme; her speech and mannerisms change; and her thoughts, perceptions, and judgment are impaired.

¶5 Michelle had had three psychiatric hospitalizations between 2002 and 2007. On the first two occasions, in 2002 and 2004, family members had petitioned to have her involuntarily committed for treatment. On the third occasion, in 2007, she was hospitalized after reportedly driving her car into a canal during a psychotic episode while she was pregnant, off her medication, manic, and believing "the devil was inside her." Upon her discharge, she told her sister Lisa that she had not been ordered to accept treatment because, she claimed, she had "convinced the mental health facility" that her psychotic behavior was only due to sleep deprivation.

¶6 In fact, however, after that incident and her third hospitalization, Michelle was again court-ordered in 2007 to accept treatment and take her prescribed medicine. But, because she was several months pregnant at the time, she did not want to take—and did not take—her medications. According to her mother, Michelle believed they were "toxic, and dangerous to her."

¶7 Since late 2001, Michelle had been involved intermittently with Mia's father, Lawrence Leight.[2] Their on-again-off-again relationship was turbulent and marked by ongoing episodes of domestic violence. Michelle described Leight as "very manipulative" and abusive, an assessment her brother, Nathan, confirmed. Nathan

[2]Leight's parental rights to Mia were terminated on August 12, 2009, on the ground of abandonment.

described Leight as "frankly, . . . just a crazy guy," who was continuing even in 2009 to cause their family "a great deal of anguish."

¶8 Michelle's mother testified she had shared Nathan's concerns about Leight's "behavior, and his level of mental health," from the first time she had met him. And, she testified, the times when Michelle had renewed her relationship with Leight over the years tended to coincide with the times she was off her medication and manifesting other signs of her illness as well. Dr. Ralph Wetmore, who performed a psychological evaluation of Michelle for CPS in December 2008, testified Michelle's continuing relationship with Leight was one example of her poor judgment that could put her child at risk.

¶9 In March 2008, Michelle had been arrested for attempting to murder Leight. Taking three-month old Mia along, Michelle had driven to Leight's home with a steak knife, intending to kill him. With Mia less than ten feet away in her car seat, Michelle had stabbed Leight in the chest. He sustained life-threatening injuries and was transported to a hospital. Michelle was taken to jail where she was held without bond, and Mia was taken into protective custody and placed in foster care.

¶10 Two days later, ADES filed a dependency petition, and Mia was adjudicated dependent at a hearing in April after Michelle entered a denial to the allegations of the petition but waived her right to a contested dependency hearing. Charged with attempted murder, Michelle remained incarcerated for nine months, until late December 2008. Her criminal case had been resolved when she pled guilty to a charge of domestic-violence aggravated assault causing serious physical injury. In

October 2008, she had been placed on five years' probation and assigned a probation officer who specialized in supervising seriously mentally ill probationers. Because she had also been ordered to serve a total of nine months in jail as a condition of her probation, she was not released from incarceration until December 22.

¶11 The following week, Michelle underwent the psychological evaluation noted above. As Dr. Wetmore later testified, Michelle's "significant mental health difficulties," her history of emotional instability, her sometimes poor judgment, and her occasionally impulsive, even violent, behaviors led him to conclude it would be potentially dangerous for Mia to be returned to Michelle's care. He testified:

> [T]here continued to be concerns that she might again decide to not remain on her medications, and even if she were on medications there would continue to be concerns that she might react impulsively, and perhaps violently to an emotionally laden situation, and could again place her daughter in a potentially dangerous situation.

As a result, Wetmore did not recommend that regular visitation between Michelle and Mia commence.

¶12 Nonetheless, at a permanency hearing in March 2009, the juvenile court extended the preexisting, concurrent case plan of both reunification and severance and ordered ADES to "make every effort to provide one monthly supervised visit" between Mia and Michelle. In June, the court changed the permanency goal to severance and adoption. ADES filed a motion to terminate Michelle's parental rights pursuant to § 8-533(B)(3) and (B)(8)(c), and the matter proceeded to a contested termination hearing that concluded on November 5, 2009.

Discussion

¶13 In challenging the termination of her parental rights on the ground of mental illness, *see* § 8-533(B)(3), Michelle contends ADES failed to prove she was unable to parent adequately "*at the time of severance.*" Indeed, the record demonstrates that, since being released from jail in December 2008, Michelle had worked hard to comply with the requirements of her case plan, had faithfully followed a medication regimen that appeared to be treating her symptoms effectively, and was enjoying markedly improved mental health as a result. Her sister and sister-in-law both agreed, when testifying in late October 2009, that Michelle had made "amazing" progress since getting out of jail; her mother likewise testified Michelle had been "doing great" with her current combination of medication and counseling and agreed that Michelle's mental health was the best it had been in many years.

¶14 Yet, given Michelle's long history of cyclical ups and downs, not one of the four members of her family who testified favored Mia's being returned to Michelle. All believed that Michelle's ability to maintain her present state of mental health would require ongoing effort, a minimum of stress, and almost certainly the assistance of her recently widowed mother, who was then sixty-six years old. In addition, her brother expressed concern that Michelle is unable to support a child financially, as she has been unable to hold a job and lives with their mother; Michelle testified her income consists of the $481 per month she currently receives in social security disability income. In light of Michelle's history, her family members were deeply concerned that, over time, she would eventually repeat the cycle of discontinuing her medication, becoming manic, and

experiencing what Nathan described as a "nosedive" back into mental illness, all to the great detriment of a child in her care.

¶15 Dr. Wetmore testified Michelle's form of bipolar disorder is cyclical, cannot be cured, and can only be managed with medication. In addition, he explained, it is common for persons with bipolar disorder to dislike and thus sometimes discontinue their medication:

> [M]any bipolar clients do not like to take medications, because, although, it—the medications tend to keep them from being severely depressed, they also depress the highs, the creativity, the mania that is sometimes very enjoyable by clients.
>
> They feel that if they're on medications that their behavior is too controlled. They are not able to express themselves the way they can when they are not on medications. So, there seems to be a distinct conflict about whether or not to take medication, even though it may be helpful in reducing the symptoms.

¶16 Given that known tendency of "many" persons with bipolar disorder, and given the number of times historically Michelle had already discontinued her own medication, Wetmore testified his ultimate opinion was unaffected by the fact that she was currently stable on her present regimen of medications, because her current stability "may not accurately predict the future." Consequently, it was Wetmore's recommendation "that Mia not be returned to Michelle's care."

¶17 The juvenile court found the evidence clear and convincing that Michelle's "trend," over a period of years, of discontinuing her medication "and putting herself and others at risk as a result" created "a substantial likelihood" that she would do so again in

the future and thus endanger Mia. As a result, the court found Michelle could not adequately discharge her parental responsibilities. Wetmore's testimony, along with abundant other evidence in the record, supports the finding that Michelle's cyclical bipolar disorder will persist for a prolonged, indeterminate period, carrying with it the known risk that she would again stop taking the medication she needs to maintain her mental health, leading to the ultimate conclusion that Michelle cannot safely parent Mia as a result of her illness.

¶18 Because we have found the evidence supports the termination of Michelle's parental rights pursuant to § 8-533(B)(3), we need not address her arguments pertaining to termination under § 8-533(B)(8)(c) based on the length of time Mia had remained in an out-of-home placement. *Michael J.*, 196 Ariz. 246, ¶¶ 12, 27, 995 P.2d at 685, 687. The central focus of those arguments, however, is substantially the same as Michelle's separate assertion that ADES failed to prove that terminating her parental rights was in Mia's best interests. In each instance, Michelle's contentions center on her claim that the juvenile court improperly found ADES had made a diligent effort to provide appropriate reunification services, as it is equally obliged to do under either § 8-533(B)(8)(c) or when terminating the rights of a mentally ill parent pursuant to § 8-533(B)(3). *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶¶ 34, 42, 971 P.2d 1046, 1053, 1054 (App. 1999).

¶19 Although Michelle itemizes and critiques the various reunification services the juvenile court found ADES had provided, she has not identified any specific services ADES did not offer her that might have made a difference in the outcome of this case.

Moreover, ADES is not required to furnish rehabilitative services when the effort would be futile. *Id.* ¶ 34. Here, for the reasons already discussed, it was ultimately the nature, severity, and chronicity of Michelle's mental illness that meant it would have been futile for ADES to provide any more or different reunification services. Although the court did not make an express finding that continuing to provide services, or providing some other services, would have been futile, that finding is implicit in its ruling. The record supports the conclusion that the services ADES provided Michelle were reasonable, appropriate, and sufficient under the circumstances.

¶20 Finally, Michelle contends she received ineffective assistance of counsel from each of her two appointed attorneys. She asserts her first attorney failed to advocate zealously for visitation rights for her; failed to object to, or appeal from, Mia's placement in October 2008 with foster parents who live outside Pima County; failed to seek a continuance of the permanency hearing or object when the juvenile court in July 2009 relieved ADES of the duty to continue to provide reunification services; and failed to prepare for trial, necessitating a substitution of counsel just as the termination hearing was scheduled to begin on August 26, 2009. Michelle contends her second attorney failed to object to the admission in evidence of her complete mental health records from La Frontera.

¶21 Although the law governing ineffective assistance claims in proceedings to terminate parental rights has yet to be fully developed in Arizona, we have previously recognized a due process right to the effective assistance of counsel to the extent necessary to ensure that severance proceedings are fundamentally fair and the results of

those proceedings are reliable. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 14, 173 P.3d 1021, 1025 (App. 2007). As we did in *John M.*, 217 Ariz. 320, ¶ 14, 173 P.3d at 102, we look for guidance to the two-part standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), for demonstrating ineffective assistance by criminal defense counsel. We thus assume, by analogy, that a parent claiming ineffective assistance in a severance proceeding must likewise establish both substandard performance by counsel and resulting prejudice. *John M.*, 217 Ariz. 320, ¶ 17, 173 P.3d at 1026.

¶22 Although Michelle has complained about certain aspects of the performance of both of her lawyers, she has offered nothing beyond her own characterizations of that performance to demonstrate that either attorney fell below prevailing standards of professional competence. Most importantly, she has not "demonstrate[d] that counsel's alleged errors were sufficient to 'undermine confidence in the outcome' of the severance proceeding [or] give rise to a reasonable probability that, but for counsel's errors, the result would have been different." *Id.*, ¶ 18, *quoting Strickland*, 466 U.S. at 694. *See also* Ariz. Const. art. VI, § 27 ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.").

¶23 As in any severance proceeding, the juvenile court here was charged with protecting not only Michelle's "fundamental liberty interest in the care, custody, and control of h[er] child," but also Mia's competing interests "in stability, safety, security, and a normal family home . . . as well as [in] the 'prompt finality that protects' those

interests." *John M.*, 217 Ariz. 320, ¶ 15, 173 P.3d at 1025, *quoting In re Pima County Juv. Action No. S-114487*, 179 Ariz. 86, 97, 101, 876 P.2d 1121, 1132, 1136 (1994). Our review of the record allows us to say with confidence that "substantial justice" was done in this case.

¶24 We find that none of the errors Michelle has asserted on appeal warrant reversal and that the record supports the juvenile court's findings, which in turn, support its legal conclusions. The court's order of November 24, 2009, terminating Michelle's parental rights to Mia is therefore affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge